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February 23, 2011

VIA ELECTRONIC CASE FILING

The Honorable Joseph F. Bianco
United States District Court Judge
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: Zarda v. Altitude Express, Inc., et al.
Case No.: CV-10-4334 (JFB)(ARL)

Your Honor:

This firm is counsel to Altitude Express, Inc., *et al.*, Defendants in the above-referenced action. We write in response to Plaintiff's February 22, 2011 letter motion seeking permission to amend the Complaint. For the reasons set forth *infra*, we respectfully request Your Honor deny Plaintiff's application, and hear oral argument on this issue.

As an initial matter, while Plaintiff did indeed attempt to obtain our consent to amending the complaint prior to his making the instant application, the draft Proposed Amended Complaint he originally sent us on February 7, 2011 (hereinafter, "First Proposed Amended Complaint") is markedly different than the draft attached in connection with this motion (hereinafter, "Second Proposed Amended Complaint"). See Exhibit "A." As such, his representations to Your Honor are inherently disingenuous. Specifically, the Second Proposed Amended Complaint contains approximately eleven (11) newly numbered paragraphs in the section entitled "Factual Allegations Underlying Plaintiff's Claims" than the First Proposed Amended Complaint. While some of these newly numbered paragraphs are the result of a change in formatting, a number of the paragraphs contain new factual allegations altogether that were not contained in the First Proposed Amended Complaint. Moreover, the Second Proposed Amended Complaint is replete with additional qualifiers and allegations regarding Defendants' purported "intent;" none of which were included in the February 7, 2011 version. As such, Plaintiff failed to seek our consent to file the newly proposed Amended Complaint in good faith prior to making this application.[1]

[1] Normally, we would not make an issue of small inconsistencies, however, Plaintiff has all but disregarded his formal discovery obligations and Your Honor's Rules.

Moreover, in the Second Proposed Amended Complaint, Plaintiff intentionally asserts allegations known to be false. Specifically, in paragraph 44 of the Second Proposed Amended Complaint, Plaintiff affirmatively states Defendant Maynard "purposely lost custody of the tape [of the jump in question] so that plaintiff could not use it in his defense." Such a statement is disingenuous as Defendants have already provided Plaintiff with a copy of the jump video in connection with their discovery obligations. Thus, such a proposed amendment is based upon a false statement and further evidence that Plaintiff routinely asserts conclusory allegations without a shred of factual support.

While Plaintiff argues that "leave to amend is freely given," he conveniently fails to include the entire standard when seeking judicial approval of an amendment; namely, the court should freely give leave **when justice so requires**. F.R.C.P. § 15(a)(2). "[W]hether to permit a plaintiff to amend its pleadings is a matter committed to the Court's sound discretion." Slayton v. American Express Co., 460 F.3d 215, 226 n. 10 (2d Cir. 2006) (quotation marks and citation omitted). "Leave to amend, though liberally granted, may properly be denied for: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, *etc.*'" Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 1998) (citing Forman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). Plaintiff offers no reason why justice requires he be allowed to amend his complaint.

In the case at bar, amending the Complaint to include additional causes of action would be unjust. Plaintiff seeks to add a NYLL minimum wage claim, as well as an additional New York State Human Rights claims in an effort to obtain damages greater than those provided under Title VII. Plaintiff originally failed to include these causes of action, but suddenly "remembered" that Title VII expressly sets a damage cap, and offers no reason for his failure to include a NYLL minimum wage claim at the commencement of this litigation. Plaintiff offers no reason for his failure to include such causes of action at the onset of litigation. As such, it would stand to reason the omission was a tactical decision to not include these causes of action.

Further, upon receipt of Defendants' pre-motion letter seeking partial dismissal of Plaintiff's Complaint, Plaintiff stated that he would withdraw his asserted FLSA claims and NYLL overtime claims should Defendants provide proof they met the test for the seasonal amusement/recreation exemption. Defendants subsequently provided such proof both to Your Honor and to Plaintiff. Now, reneging, Plaintiff renews his futile FLSA and NYLL overtime claims. The continuation of these claims would be futile as Defendants satisfy the legal test for the FLSA exemption. As such, Plaintiff's application should be denied.

Defendants disagree with Plaintiff's contention that they will not be prejudiced by his Second Proposed Amended Complaint. While the parties are engaging in discovery, the process has been unnecessarily delayed and frustrated by Plaintiff. Whereas Defendants' desire to engage in paper discovery has been deemed "old school" by Plaintiff's Counsel, Plaintiff's production of paper discovery has been virtually non-existant, requiring the Motion to Compel currently pending before Your Honor. Without obtaining complete and adequate responses to their outstanding discovery demands, as well as a new set of discovery demands which will likely be necessary should Plaintiff be permitted to amend his Complaint, the parties will be

unable to conduct depositions in the foreseeable future. Thus, discovery will become protracted due to Plaintiff's tactics and decision to omit information in his original Complaint he now seeks to add.

For all the foregoing reasons, Plaintiff should be precluded from amending his Complaint with a "cleaned up version of the original" as discovery, and the case in general, will be unnecessarily delayed. Additionally, Counsel for Plaintiff's behavior during the course of this litigation does not warrant such generous relief from Your Honor.

Counsel remains available should Your Honor require additional information regarding this submission.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: Gregory Antollino, Esq. (*via* electronic case filing)

EXHIBIT "A"

SZabell@laborlawsny.com

From: Gregory Antollino <gregory10010@verizon.net>
Sent: Monday, February 07, 2011 4:59 PM
To: SZabell@laborlawsny.com
Subject: Proposed amended complaint
Attachments: amended_complaint.pdf

Here is a proposed amended complaint. Please indicate whether you will consent to filing and I'll prepare a stip. If the allegation about the destruction of the tape is incorrect, I'll take it out upon production of the tape. I also am expecting a more robust document production. Please advise when you will produce it.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DONALD ZARDA,

Plaintiff,

-against-

ALTITUDE EXPRESS, INC., dba Skydive Long Island, and RAY MAYNARD,

Defendants.
----------X

AMENDED COMPLAINT

10-cv-04334-JFB -ARL

JURY TRIAL DEMANDED

Plaintiff hereby alleges upon personal knowledge and information and belief as follows:

NATURE OF THIS ACTION

1. This action is brought by Plaintiff, a gay man, to recover damages for Defendants' discriminatory and otherwise illegal conduct in, among other things, discharging him because of a homophobic customer.

THE PARTIES

2. Plaintiff is a citizen of the State of Missouri.

3. Defendants Altitude Express, Inc., operating as "Skydive Long Island" in Calverton, New York is a corporation organized under the laws of the State of New York, located in Suffolk County, and operates as a "drop zone," i.e., a place

where individuals can come to Skydive under the close supervision of experienced Skydive instructors.

4. Defendant Ray Maynard is the Chief Executive Officer of Skydive Long Island and, upon information and belief, its sole shareholder. Upon information and belief he is a citizen of New York.

5. Plaintiff is an experienced Tandem and Freefall (i.e., Skydive) instructor, who was an employee at Skydive Long Island for various summers in the last decade until his termination in July 2010.

JURISDICTION AND VENUE

6. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States, among them Title VII of the Civil Rights Act of 1964 as amended and the Fair Labor Standards Act. Jurisdiction is also independently predicated on diversity of citizenship.

7. Venue is properly placed in this district pursuant to 28 U.S.C. § 1391(c) in that Defendants Skydive Long Island is deemed to reside in this judicial district.

FACTUAL ALLEGATIONS UNDERLYING PLAINTIFF'S CLAIMS

8. Plaintiff repeats and realleges the allegations set forth in all previous paragraphs as if fully set forth herein.

9. Plaintiff was employed at Altitude Express, Inc., dba Skydive Long Island (hereinafter "Altitude") as a Tandem & Accelerated Freefall Instructor in the summers of 2001, 2009 and 2010. Altitude Express has approximately 20-30 employees.

10. Plaintiff is has been a licensed instructor in this field since 1995. He has participated in 3500 jumps over the course of his distinguished career.

11. He worked for the defendants in the summers of 2001, 2009 and 2010. Skydiving is a seasonal sport and defendants operate mostly in the warmer weather.

12. While employed by Skydive Long Island, plaintiff was expected to be at work, seven days a week, until released. The hours of operation were either 7:30 AM to sunset or 9:30 AM to sunset and thus plaintiff was expected not to leave the premises in case a potential customer came, unless it was raining.

13. Although expected to be on the premises approximately twelve (or more) hours per day, plaintiff was only paid per jump. Some days went by when he would be there all day and not make a dime, not even minimum wage for the hours he spent at work at his employer's insistence.

14. A skydive is an intimate experience, for the safety of the passenger. Novices who yearn for the thrill of a skydive cannot do so on their own, and thus the instructor must strap himself hip-to-hip and shoulder-to-shoulder with the client. Because of this, before they dive, students must sign a release that contains the following language:

> If I am making a student jump, I understand that I will be wearing a harness which will need to be adjusted by the jumpmaster. If my jump is a tandem jump, I understand that the tandem master will attach my harness to his and that this will put my body in close proximity to that of the tandem master. I specifically agree to this physical contact between the tandem master and myself.

15. Before the client and the instructor jump out of the plane, the client is often sitting on the instructor's lap. The experience is tense for a novice, who is about to jump out of the plane with a stranger strapped to him or her.

16. Notwithstanding the waiver, in order to break the ice and make the client more comfortable, instructors often make light of the intimate situation by making a joke about it.

17. For example, when a man is strapped to another man, plaintiff witnessed instructors saying something like, "I bet you didn't know you were going to be strapped so close to a man." Plaintiff also heard

instructor state, in reference to a budge protruding from the equipment, "That's the straps you're feeling.".

18. On more than one occasion, plaintiff heard straight instructors say, jokingly, when strapped to male clients, "Don't worry, I'm a lesbian." Or, when a straight man was strapped to a straight man (especially when his girlfriend was present), the instructor might say, "Does you're girlfriend know that you're gay?"

19. This was an openly tolerated form of banter. Plaintiff, as an openly gay man was often the butt of jokes about his sexual orientation. He had mixed feelings about that, but was not troubled when sexual banter was a way of breaking the ice in a tense situation. On occasion, over the years, when he was tightly strapped to a woman he might say something like, "You don't have to worry about us being so close because I'm gay."

20. This was never a problem until one homophobic customer complained about it. On June 18, 2010, plaintiff was suspended for making this remark to a woman whose name, upon information and belief, is Rosanna.

21. It was known at work that plaintiff is gay and he was open about it. Notwithstanding this, however, the terms and conditions of

employment were not the same as compared between plaintiff and other similarly situated employees.

22. Ray Maynard was hostile to any expression of sexual orientation that did not conform to sex stereotypes. As one example, he criticized plaintiff's wearing of the color pink at work. Women at the workplace were allowed to wear pink, and did without criticism.

23. However, on one occasion, plaintiff broke his ankle and had to wear a cast. It so happened that the color of the cast plaintiff chose was pink. When Ray saw the pink cast for the first time he scoffed at it and said, "That looks gay!" Later, at a staff meeting he said, "If you're going to remain here for the day, you're going to have to paint that black," pointing to plaintiff's cast.

24. Plaintiff's toenails were also painted pink, which at the time was plaintiff's preference. Women often wore open-toed sandals to work, as well as pink toenail polish.

25. Additionally, many other instructors were barefoot at the drop zone. When Ray saw plaintiff's pink toenail polish, however, he insisted that plaintiff wear a sock and cover up his foot.

26. Plaintiff would have begrudgingly tolerated these backwards attitudes towards men and their use of certain colors, had plaintiff not been fired for expressing to a customer that he was gay.

27. Ray openly tolerated men discussing women and their physical attributes. Specifically, Ray and the men at the office would ogle at women's breasts, including on videos that the company had procured for passengers who had hired the company for a joy ride skydive with an accompanying video.[1] Men often talked of their sexual exploits, and Ray openly discussed his problematic marriage.

28. Plaintiff mentioning the fact that he is gay to a passenger, however, got him fired.

29. In his termination interview, Ray said that plaintiff was being fired because plaintiff had discussed his "personal escapades" outside of the office with a passenger (Rosanna).

30. This was completely untrue. All of the men at Altitude made light of the intimate nature of being strapped to a member of the opposite sex. Plaintiff was fired, however, because the levity he used honestly referred to his sexual orientation and did not conform to the straight male macho stereotype.

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[1] Customers who hired Altitude were referred to as "passengers."

31. Mentioning one's sexual orientation is not a discussion of a "personal escapade," and is as much a protected activity as mentioning to someone that one is Catholic, Scottish, or Hispanic.

32. Ray also made other statements in defense of his termination of plaintiff, including that plaintiff had allegedly touched Rosanna inappropriately.

33. The fact that Rosanna would simultaneously complain that plaintiff was gay *and* that he touched her inappropriately underscores the facially pretextual manner of the reason for plaintiff's termination, especially in light of the release that all passengers must sign, acknowledging that they will be in close bodily contact with instructors.

34. Maynard, however, did not even investigate Rosanna's allegations by inquiring of plaintiff's side of the story. He did not question plaintiff about the allegations, but decided to accept them as true because, after all, she was a woman, and therefore would give Maynard cover for firing plaintiff since a woman, in general, would be more likely to be believed in the context of a complaint about inappropriate touching by a man.

35. Even though there was a videotape of the jump that showed no inappropriate touching, Maynard dismissed said evidence and

purposely lost custody of the tape so that plaintiff could not use it in his defense.

36. In all, the allegation of touching, if it were even made by Rosanna, was a false pretext for plaintiff's termination, which happened because of one homophobic customer's complaint about being near a gay person and of because of plaintiff's failure to conform to stereotypical gender roles for men.

37. Maynard Knew that plaintiff was a homosexual and would have no motive to touch a female passenger in any manner other than to protect her safety in accordance with proper procedures.

Maynard knew that Rosanna had signed a release wherein she knew she would in close bodily contact with an instructor.

38. Maynard's reaction to Rosana's baseless complaint – without even as much as asking for plaintiff's side of the story -- is an instance of sex stereotyping, insofar as it validates a woman's complaint against a man whereas a man's complaint against a woman – gay or straight – would never have been accorded any credence in similar circumstances. Ray knew this, yet he was more than happy to use what he knew to be a patently false touching complaint against a man as a pretext for firing for being – and saying – that plaintiff is gay. He now sues for relief.

FIRST CAUSE OF ACTION
DISCRIMINATION UNDER TITLE VII

39. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

40. Plaintiff was fired because his behavior did not conform to sex stereotypes.

41. Such actions were in violation of Title VII.

42. By virtue of the foregoing, Plaintiff has been damaged.

SECOND CAUSE OF ACTION
SEXUAL ORIENTATION DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

43. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

44. Plaintiff was fired because of his sexual orientation.

45. Such actions were in violation of the Executive Law of the State of New York.

46. By virtue of the foregoing, Plaintiff has been damaged.

THIRD CAUSE OF ACTION
GENDER DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

47. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

48. Plaintiff was fired because his behavior did not conform to sex stereotypes.

49. Such actions were in violation of Title VII.

50. By virtue of the foregoing, Plaintiff has been damaged.

FOURTH CAUSE OF ACTION
VIOLATION OF THE FLSA

51. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

52. At all times mentioned herein, as limited by the applicable statutes of limitation, Defendants failed to comply with the FLSA, in that Defendants frequently required and permitted Plaintiff to work more than 40 hours per week, but provision was not made by Defendants to pay Plaintiff at the rate of one and one-half times the regular rate for the hours worked in excess of the hours provided for in the FLSA.

53. Additionally, plaintiff was not even paid minimum wage for the time he was required to sit and wait around for potential skydive clients

to appear

54. Most of the records concerning the number of excess hours worked by Plaintiff, and the compensation they received in work weeks in which excess hours were worked, are in the exclusive possession and under the sole custody and control of the Defendants.

55. Plaintiff is unable to state at this time the exact amount owing to them at this time, and proposes to obtain such information by appropriate discovery proceedings to be taken promptly in this cause.

56. Upon information and belief, Defendants is and was at all relevant times herein aware that overtime pay is mandatory for non-exempt employees who work more than 40 hours per week.

57. Upon information and belief, Defendants are and were at all material times herein fully aware that Plaintiff worked more than 40 hours per week without receiving overtime compensation for such additional work.

58. Additionally, plaintiff did not even earn minimum wage for the majority of hours he spent at the defendant company.

59. Based upon the foregoing, Defendants, for violating the FLSA, are liable on Plaintiff's first cause of action in an amount to be determined at trial, plus liquidated damages, attorney's fees and costs.

FIFTH CAUSE OF ACTION
VIOLATION OF THE NEW YORK STATE OVERTIME LAW

60. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

61. At all material times herein Defendants failed to comply with, *inter alia*, NYLL § 663(1) and 12 NYCRR § 142-2.2 in that Plaintiff consistently worked for Defendants in excess of the maximum hours provided by state and federal law, but provision was not made by Defendants to pay Plaintiff at the rate of one and one-half times the regular rate for the hours worked in excess of the hours provided for by state and federal law.

62. Upon information and belief, Defendants were at all material times herein aware that overtime pay is mandatory for non-exempt employees who work more than 40 hours per week.

63. Upon information and belief, Defendants' non-payment of overtime pay to Plaintiff was willful.

64. Based upon the foregoing, Defendants, for consistently violating New York's Labor Law and its implementing regulations are liable on Plaintiff's second cause of action in an amount to be determined at trial, plus a 25% statutory penalty, attorney's fees and costs.

SIXTHCAUSE OF ACTION
VIOLATION OF THE NEW YORK MINIMUM WAGE LAW

65. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

66. At all material times herein Defendants failed to comply with, *inter alia*, NYLL § 663(1) and 12 NYCRR § 142-2.1 in that Plaintiff consistently worked for Defendants without being paid even a minimum wage for hours in which there were no paying customers.

67. Upon information and belief, Defendants were at all material times herein aware that minimum wage is mandatory.

68. Upon information and belief, Defendants' non-payment of minimum wages to Plaintiff was willful.

69. Based upon the foregoing, Defendants, for consistently violating New York's Labor Law and its implementing regulations are liable on Plaintiff's second cause of action in an amount to be determined at trial, plus a 25% statutory penalty, attorney's fees and costs.

WHEREFORE, Plaintiff demands as follows:

A. Compensatory damages in excess of the jurisdictional amount required of this court;

B. Punitive damages;

C. Cost of suit and attorneys fees;

D. Liquidated damages;

E. Such other relief as the Court may deem just and proper.

Dated: New York, New York
February 7, 2011

/s/
GREGORY ANTOLLINO
Attorney for Plaintiff
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(212) 334-7397